Supreme Court, U.S.
FILED

08-85 JUL 13 2008

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No. 08-_____

In The

# Supreme Court of the United States

AARON PEREZ,

*Petitioner,*

vs.

DEBRA DEXTER, WARDEN,

*Respondent.*

**On Petition For Writ Of Certiorari To The Ninth Circuit Court Of Appeals**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether a certificate of appealability should have been granted to consider the dismissal of petitioner's untimely § 2254 habeas petition, filed by a retained attorney, after petitioner was denied the opportunity to locate new counsel to develop the record to show entitlement to equitable tolling when the first attorney clearly did not know the law, may have misrepresented his qualifications, and was burdened by a conflict of interest from arguing his own sufficiently egregious performance?

## PARTIES TO THE PROCEEDING

The parties to the proceeding are listed in the caption. Petitioner is serving a life sentence at Ironwood State Prison in Blythe, California.

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## PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

Petitioner AARON PEREZ respectfully prays that a writ of certiorari issue to review the March 31, 2008, order of the Ninth Circuit Court of Appeals denying his request for a certificate of appealability ("COA") after his § 2254 habeas corpus petition was dismissed as untimely.

## OPINION BELOW

The order of the Ninth Circuit is unpublished and is attached as Appendix A. The order denying the motion for reconsideration with suggestion for rehearing en banc is attached as Appendix G.

## JURISDICTION

The order denying the COA was issued on March 31, 2008. (Appendix A.) The order denying the motion for reconsideration with suggestion for rehearing en banc was issued on April 23, 2008. (Appendix G.) This petition for writ of certiorari is due for filing on July 22, 2008. Supreme Court Rule 13. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTES AND RULES INVOLVED

**28 U.S.C. § 2253(c)**

(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –

> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

**Rule 22(b)(1), Federal Rules of Appellate Procedure**

(1) In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c). If an applicant files a notice of appeal, the district judge who rendered the

judgment must either issue a certificate of appealability or state why a certificate should not issue. The district clerk must send the certificate or statement to the court of appeals with the notice of appeal and the file of the district-court proceedings. If the district judge has denied the certificate, the applicant may request a circuit judge to issue the certificate.

**28 U.S.C. § 2244(d)(1)(A)**

A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation shall run from the latest of – (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review; . . .

## STATEMENT OF THE CASE

### A. State Proceedings

In April 2002, Petitioner was convicted of attempted voluntary manslaughter and shooting into an occupied motor vehicle. (California Penal Code §§ 664/187; 246.) He was sentenced to life imprisonment.

On February 17, 2004, the California Court of Appeal, Second Appellate District, Division Eight, affirmed Petitioner's convictions in an unpublished decision. (Case No. B162368.)

On May 12, 2004, the California Supreme Court denied the petition for review. (Case No. S123726.) Absent any tolling, the federal habeas petition would have been due no later than August 10, 2005. 28 U.S.C. § 2244(d)(1)(A); *Patterson v. Stewart*, 251 F.3d 1243, 1246 (9th Cir. 2001).

On July 7, 2004, before the federal statute of limitations began to run, Petitioner's family retained attorney Michael Garey to determine whether there were grounds for state and/or federal habeas corpus. On September 27, 2004, Petitioner's family retained attorney Michael Garey to *file* the state and federal habeas corpus petitions.

On August 10, 2005, Mr. Garey filed a petition for writ of habeas corpus in the state court of appeal. This petition was denied on October 12, 2005. (Case No. B185008.)

On October 24, 2005, Mr. Garey filed a petition for writ of habeas corpus in the state supreme court. This petition was denied on August 30, 2006. (Case No. S138281.)

## B. Federal Proceedings

### 1. District Court

On October 23, 2006, Mr. Garey filed a form petition for writ of habeas corpus in the Central District of California raising four issues, two of which concerned ineffective assistance of prior counsel. (Case No. CV-06-6743.) The petition was accompanied by a

supporting brief and numerous exhibits. (Clerk's Record "CR" 1, 3, 4.)

On December 26, 2006, Respondent, the California Attorney General, filed a motion to dismiss the petition as time barred. (CR 8.) Respondent also argued that the petition was a mixed petition because a portion of ground three was unexhausted.

On March 22, 2007, Mr. Garey filed an opposition to the motion to dismiss. (CR 17.) He argued that Petitioner was entitled to statutory tolling under § 2244(d)(1)(D) because he, Garey, was not aware of the factual predicate for the claims until he had reviewed the record, spoken with prior counsel and conducted legal research. (CR 17 at 18.) Mr. Garey also argued that Petitioner was entitled to "**tolling the starting** and/or the continuation of the statutory clock" because the case was "complex." (CR 17 at 20, emphasis added.) Further, he argued that the problem was "compounded" because Calipatria State Prison was on lockdown and Petitioner was denied access to legal materials. (CR 17 at 22.) Mr. Garey's supporting declaration averred that he was retained by Petitioner's father on July 7, 2004, to review the record and investigate whether there were potential issues for habeas corpus. (CR 17, Garey ¶ 1.) He met with Petitioner at Calipatria State Prison on August 19, 2004. (CR 17, Garey ¶ 2.) After reviewing the "trial documents" Mr. Garey solicited declarations from prior counsel in August 2004. (CR 17, Garey ¶ 3-7.)

On September 27, 2004, Mr. Garey was retained to prepare and file the habeas corpus petition. (CR 17, Garey ¶ 9.) However, "preparation of the legal and factual arguments took much longer than expected" given the size of the record and the multiple layers of prior incompetent counsel. (CR 17, Garey ¶ 10.)

Petitioner also filed a declaration in support of the opposition which averred that his family retained Mr. Garey on or about July 7, 2004, to review the case and that he was retained to research and investigate the petition on September 27, 2004. (CR 17, Aaron Perez ¶ 7.)

On April 6, 2007, the Magistrate Judge issued a Report and Recommendation ("Report") granting Respondent's motion to dismiss the petition as time barred. (CR 19.) (Appendix F.)

> Petitioner alleges that equitable tolling is warranted because it took him time to retain counsel, and it took retained counsel time to review the record to 'discover' the many complex instances of ineffective assistance of trial and appellate counsel. In support of this argument, petitioner's counsel states that he spent several months in a fruitless effort to find a transcript which would reflect whether petitioner's trial counsel actually sought a continuance (as the attorney stated he did in his declaration).
>
> The fact that petitioner's claims are 'factually and legally complex' is not an extraordinary circumstance preventing petitioner

from filing a timely federal petition. If such were the case, then many petitioners would be entitled to equitable tolling, because much of criminal law, especially in the federal habeas context, could be characterized as 'complex,' especially if a petitioner is proceeding pro se.

According to the declarations submitted by petitioner, he was able to retain counsel as early as July 7, 2004, before his conviction became final and before the limitations period began to run. Thus, the record does not support the contention that petitioner experienced such difficulty in retaining an attorney that equitable tolling is warranted.

The months that petitioner's counsel spent seeking records to corroborate trial counsel's statement do not warrant equitable tolling. As one of his claims for relief, petitioner alleges that his trial counsel was ineffective because he answered 'ready' for trial only eight days after substituting in as counsel and without time to prepare for trial. In his declaration, which was obtained by petitioner's habeas counsel, petitioner's trial counsel stated that he sought a continuance, but it was denied. In an attempt to obtain equitable tolling or delayed accrual of the limitation period, petitioner's habeas counsel says that he spent months searching for a transcript which would confirm that trial counsel made such a motion. But such a record (or the absence of such record) was not necessary for petitioner to state a claim and

> prepare a petition. To the contrary, so long as it was based upon petitioner's good faith belief in the accuracy of his allegations, petitioner's claim could have been filed in state or federal court without first waiting to determine whether trial counsel's declaration was true.

(Appendix F, Report at 5-7, record citations omitted.)

The Report also pointed out that because Petitioner was represented by counsel the prison lockdown had no part in preventing the timely filing of his federal habeas petition. (Appendix F, Report at 7.)

The Report observed that Mr. Garey "may have been negligent" for failing to file the petition on time but noted that mere negligence, malpractice, or ineffective assistance of post-conviction counsel, cannot provide the basis for equitable tolling. (Appendix F, Report at 8, citing *Miranda v. Castro*, 292 F.3d 1063, 1067-1068 (9th Cir. 2002) and *Frye v. Hickman*, 273 F.3d 1144, 1146 (9th Cir. 2001).)

The Report did acknowledge that under *Spitsyn v. Moore*, 345 F.3d 796, 800 (9th Cir. 2003), egregious attorney misconduct, such as failing altogether to file the petition, might support equitable tolling. (Appendix F, Report at 9.) In this case:

> Petitioner's counsel did not fail to file a petition that he had promised petitioner he would file. Instead, he negligently missed the deadline and failed to consider the option of filing a mixed petition in this Court and

> seeking a stay while he exhausted state remedies. **Petitioner does not allege, and nothing in the record suggests, that petitioner's counsel affirmatively misled petitioner**, failed to respond to petitioner's inquiries, or refused to return petitioner's file, thereby making it impossible for petitioner to prepare and file a timely petition on his own. In sum, this is not the sort of 'egregious' and 'atypical' attorney misconduct warranting equitable tolling.

(Appendix F, Report at 10, emphasis added.)

On April 16, 2007, Mr. Garey filed objections to the Report. (CR 23.) In addition to arguments he had already made in opposition to Respondent's motion to dismiss, he asserted that the Report failed to "balance the overall diligence of Petitioner against any prejudice to the Respondent State of California" (CR 23 at 3) and faulted the Report for "the utilization of a standard of reviewing the issue of equitable tolling that has perhaps been superceded as being too absolute and inflexible." (CR 23 at 3-4.) Mr. Garey also asserted that Petitioner was factually innocent. (CR 23 at 10.)

Most important, Garey requested that Petitioner "be given sufficient time to **secure new counsel, who would be in a position to allege and argue such facts as would potentially bring that failure within the doctrine of equitable tolling**." (CR 23 at 11, emphasis added.) Mr. Garey pointed out that Petitioner could not allege "extraordinary

circumstances" to allow for equitable tolling "because he is **still represented by current counsel, who is in no position to assert such issues on behalf of petitioner.**" (CR 23 at 12-13, emphasis added.) Petitioner reasonably relied on counsel to timely file the petition. (CR 23 at 13.)

> **[A] late filing which is time barred, depending on precise factual issues, has the same effect as a complete failure to file, and the Petitioner should be allowed time to obtain new counsel (at current counsel's expense if necessary) who can assert such issues without the obvious conflict of interest involved as to current counsel.**

(CR 23 at 13, emphasis added.)

On April 20, 2007, the Magistrate Judge filed a Supplemental Report (Appendix E, CR 20, "Supp. Report") rejecting the claim of actual innocence as merely a reiteration of an ineffective assistance of counsel claim. (Supp. Report at 2.)

The court also denied a continuance to retain substitute counsel to argue equitable tolling:

> The court has already considered and **rejected the contention that petitioner's present counsel's apparent negligence warrants equitable tolling. That determination was based upon a detailed recitation of the facts provided by**

> **petitioner's present counsel. Further briefing on the issue is not warranted.**

(Appendix E, Supp. Report at 6, emphasis added.)

On April 30, 2007, Mr. Garey filed objections to the Supplemental Report in which he again requested a continuance to obtain new counsel. (CR 24.) The court's reliance on already asserted facts was wrong as this:

> approach fails to address the gravamen of the issue, which is that the **facts upon which this Court relies are those advanced by the present counsel that the Report suggests has not been diligent. What other facts or arguments Petitioner, through new counsel, might be able to advance are simply not of record, and are issues, as noted for which current counsel has what appears to be an obvious conflict of interest.**

(CR 24 at 8-9, emphasis added.)

On May 2, 2007, the district court adopted the report and entered judgment dismissing the petition as untimely. (Appendices C, D, CR 21, 22.)

On May 30, 2007, the notice of appeal was timely filed. (CR 25.) Mr. Garey also requested a COA, arguing *inter alia*, that the district court should have granted a continuance so that Petitioner could obtain new counsel to present the equitable tolling argument. (CR 26.) "It was and is respectfully submitted that **current counsel is both a potential witness**

**on such issues, and would have what is perceived to be a debilitating conflict of interest."** (CR 26 at 9-10, emphasis added.) The district court erroneously found that further briefing was unnecessary without giving an opportunity for development of evidence and/or argument. (CR 26 at 11.) The COA was denied. (Appendix B.)

**2. Ninth Circuit**

On June 6, 2007, Mr. Perez requested a certificate of appealability from the Ninth Circuit on the following issues:

1. Whether the district court should have granted a continuance so that Petitioner could retain new counsel unburdened by a conflict of interest to prepare and file supplemental objections to the motion to dismiss the petition as time barred (which would necessarily include declarations and request for an evidentiary hearing), because federal habeas counsel Michael Garey could not raise his own egregious performance as grounds for equitable tolling under *Spitsyn v. Moore*, 345 F.3d 796, 800 (9th Cir. 2003) ("sufficiently egregious performance by counsel" may justify equitable tolling).

2. Whether this Court should remand the matter for an evidentiary hearing with counsel unburdened by a conflict of interest to determine if Mr. Garey's failure to timely file Petitioner's § 2254 habeas petition was the result of sufficiently egregious performance under *Spitsyn v. Moore*?

On March 31, 2008, a two-judge panel denied the COA. (Appendix A.) On April 23, 2008, a different two-judge panel denied the motion for reconsideration with suggestion for rehearing en banc. (Appendix G.)[1]

## REASONS FOR GRANTING THE WRIT

This Court should grant certiorari because the issue of whether sufficiently egregious performance by counsel (as opposed to mere negligence) so as to warrant equitable tolling under the AEDPA[2] is an important issue that frequently occurs in the lower courts. These courts are also in need of guidance as to *what* constitutes sufficiently egregious performance by counsel and *how* this determination should be made.

### A. Legal Standard for Granting a COA

> [T]o obtain a COA under § 2253(c), a habeas petitioner must make a substantial showing of a denial of a constitutional right, a demonstration that, under *Barefoot* [*v. Estelle*, 463 U.S. 880, 893, 103 S.Ct. 3383, 77 L.Ed.2d

[1] *See* Ninth Circuit Rules 22-1(d) and 27-10 and *Salgado v. Garcia*, 384 F.3d 769, 775 (9th Cir. 2004) ("A panel reviewing a motion for reconsideration with an en banc request for a COA denial is authorized to forward the request to the entire court for its consideration" per Gen. Ord. § 6.11).

[2] "AEDPA" stands for Anti-Terrorism and Effective Death Penalty Act.

> 1090 (1983)], includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.

*Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

In *Miller-El v. Cockrell*, 537 U.S. 322 (2003), this Court clarified that in order to obtain a COA the applicant does not have to show that he will win his appeal.

> The threshold inquiry does not require full consideration of the factual or legal bases adduced in support of his claims. In fact, the statute forbids it. When a court of appeals sidesteps this process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.

*Milller-El*, 537 at 335.

> [A] COA does not require a showing that the appeal will succeed. Accordingly, a court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief. The holding in *Slack* would mean very little if appellate review were denied because the prisoner did not convince a judge, or for

> that matter, three judges, that he or she would prevail.

*Ibid.*

> A prisoner seeking a COA must prove 'something more than the absence of frivolity' or the existence of 'mere good faith' on his or her part. We do not require the petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for writ of habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail. . . . the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.

*Id.* at 1040 (citations omitted).

### B. Equitable Tolling and the AEDPA

In *Lawrence v. Florida*, 549 U.S. 327 (2007), in holding that a petition for writ of certiorari from denial of a state habeas corpus petition does not toll the AEDPA statute of limitations, this Court said that it would "assume without deciding" (because the parties agreed) that equitable tolling was available under § 2244(d). *Id.* at 1085. "To be entitled to equitable tolling, Lawrence must show '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and

prevented timely filing." *Ibid.* citing *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005).

Lawrence had argued, *inter alia*, that his lawyer's "mistake in miscalculating the limitations period entitles him to equitable tolling." This Court unhesitatingly rejected this argument.

> If credited, this argument would essentially equitably toll limitations periods for every person whose attorney misses a deadline. Attorney miscalculation is simply not sufficient to warrant equitable tolling, particularly in the postconviction context where prisoners have no constitutional right to counsel.

*Lawrence v. Florida*, 549 U.S. at 1085, citing *Coleman v. Thompson*, 501 U.S. 722, 756-757 (1991).

### 1. Sufficiently Egregious Performance By Counsel Warrants Equitable Tolling

The Ninth Circuit has held that the one-year statute of limitations for filing a § 2254 habeas petition may be equitably tolled if "extraordinary circumstances beyond a prisoner's control make it impossible to file the petition on time." *Spitsyn v. Moore*, 345 F.3d 796, 799 (9th Cir. 2003) citing *Brambles v. Duncan*, 330 F.3d 1197, 1202 (9th Cir. 2003). The prisoner bears the burden of showing that the "extraordinary circumstances" were the cause of the untimeliness. The determination of whether equitable tolling should apply is a fact specific inquiry. *Spitsyn v. Moore*, 345 F.3d at 799.

Ordinary attorney negligence is not an extraordinary circumstance. In *Frye v. Hickman*, 273 F.3d 1144 (9th Cir. 2001), the attorney miscalculated the limitations period, but equitable tolling was disallowed. In *Miranda v. Castro*, 292 F.3d 1063 (9th Cir. 2002), the state appellate attorney misadvised the client that a federal petition should be filed one year after it should have been filed. The client's reliance on the wrong date was held not to justify equitable tolling. *Id.* at 1066.

In *Spitsyn v. Moore*, however, the Ninth Circuit held that "sufficiently egregious performance by counsel" may justify equitable tolling. 345 F.3d at 800. In that case, Spitsyn's mother hired an attorney nearly a full year before the deadline to file a habeas corpus petition and paid him $2,000. Both the mother and Spitsyn wrote numerous letters to the attorney inquiring about the status of the case. They also complained to the state bar. On January 15, 2001, two weeks before the AEDPA deadline, Spitsyn fired the attorney and requested that his files be returned. The deadline expired on January 31, 2001, and no petition was filed. On February 13, 2001, the attorney wrote a letter expressing regret for not following through on the case and returned the fee. After the state bar began an investigation, the attorney returned the file on April 4, 2001, three months after Spitsyn requested it. The attorney was ultimately reprimanded by the state bar. *Id.* at 798.

The Ninth Circuit held that Spitsyn could be entitled to equitable tolling because he had hired the

attorney well in advance of the statute of limitations deadline; the numerous efforts by Spitsyn and his mother to contact the attorney "proved fruitless"; the attorney retained the files long after they were requested to be returned; without the file it was unrealistic to assume that Spitsyn could have hired another attorney. *Spitsyn v. Moore*, 345 F.3d at 801, citing *Lott v. Mueller*, 304 F.3d 918, 924 (9th Cir. 2002) (equitable tolling may be appropriate when prisoner has been denied access to legal materials).

> It is not evident that [Spitsyn and his mother] should have concluded in time to hire another attorney that [the attorney] was going to fail them completely. Non-responsiveness may be unprofessional but it is hardly unheard of. By the time he gave up on [the attorney], or should reasonably have been expected to have given up on him, Spitsyn could have concluded that it was too late to get a new attorney to file a petition on time since [the attorney] still had the files for the case.

*Spitsyn v. Moore*, 345 F.3d at 801.

The Ninth Circuit remanded the case to the district court for further consideration on whether he "exercised reasonable diligence" because the existing record did not clearly answer that question. Spitsyn did not, for example, file his petition until September though the attorney returned the files in April. *Id.* at 802.

### 2. An Evidentiary Hearing Is Required to Determine if the Attorney's Performance Was Sufficiently Egregious

In *United States v. Wynn*, 292 F.3d 226 (5th Cir. 2002), the Fifth Circuit remanded a case for an evidentiary hearing on due diligence in regard to equitable tolling when an attorney falsely told his client that he had filed a § 2255 motion for him. The district court had acknowledged the deception but did not find due diligence. Because Wynn alleged that he had been unable to contact his attorney, an evidentiary hearing was needed.

> Our conclusion that equitable tolling may apply in this case assumes that Wynn can establish that his attorney misled his father by telling him that a habeas petition had been filed on his behalf and that Wynn reasonably relied on his attorney's misrepresentations as to the status of his case.

*Wynn*, 292 F.3d at 230-231 (emphasis added).

In *United States v. Martin*, 408 F.3d 1089 (8th Cir. 2005), the Eighth Circuit, relying on *Spitsyn v. Moore* and *United States v. Wynn*, held that Martin was entitled to equitable tolling in his late § 2255 motion because his attorney falsely told him there was no statute of limitations, failed to file the petition he had agreed to file, failed to communicate with the client or his family, and failed to return his legal papers.

In *Goedeke v. McBride*, 437 F.Supp.2d 590 (S.D. W. Va. 2006), the district court held that the Petitioner was entitled to equitable tolling when he learned that his attorney no longer represented him and filed the petition himself. There, the attorney failed to represent his client over the course of six years, despite constantly telling the client otherwise.

> Had Mr. Griffith completely abandoned Mr. Goedeke or told him he would not work on his petition, Mr. Goedeke could have acquired another attorney or filed a petition on his own. Mr. Griffith, however, consistently coerced Mr. Goedeke into believing that his petition was almost ready. Mr. Goedeke had no reason to disbelieve Mr. Griffith's constant [false] assurances.

*Id.* at 598. The district court found that the attorney committed serious misconduct by misleading the client so as to warrant equitable tolling. *Ibid.*, citing e.g., *Spitsyn v. Moore*.

Last year, in an unpublished decision, the Ninth Circuit remanded a case for an evidentiary hearing on whether equitable tolling would apply due to the actions or inactions of the attorney. *Rodriguez v. Marshall*, 2007 U.S. App. LEXIS 15996 (July 2, 2007) (Docket No. 05-16942).[3] There, appellate counsel promised to inform Rodriguez of any actions taken by

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[3] This decision is cited pursuant to Rule 32.1(a), Fed. R. App. Proc.

the state court, but failed to tell him that the California Supreme Court denied his petition for review on June 11, 2003. Rodriguez did not learn until December 14, 2004, about the denial.

> In this case, the record is not clear as to what efforts Rodriguez made to contact appellate counsel's office or when any purported communications occurred. Thus, we cannot evaluate whether appellate counsel's oversight was sufficiently egregious or whether Rodriguez acted with the requisite diligence to justify equitable tolling. We therefore REVERSE and REMAND for an evidentiary hearing to determine whether equitable tolling should apply.

*Rodriguez v. Marshall*, LEXIS 15996 [*4].

### C. Further Factual Development and/or an Evidentiary Hearing Conducted by Counsel Who Does Not Have a Conflict of Interest May Reveal that Garey's Performance was Sufficiently Egregious To Warrant Equitable Tolling

#### 1. Mr. Garey Could Not Argue His Own Sufficiently Egregious Performance

It is by now axiomatic and hornbook law that a lawyer cannot argue his own ineffectiveness, or in this case, present and argue his own sufficiently egregious performance so as to warrant equitable tolling. *See Hoffman v. Arave*, 236 F.3d 523, 532 (9th Cir. 2001) (defendant's failure to timely file ineffective

assistance of counsel claims not procedurally defaulted because he was represented by same attorney during the relevant time period and the attorney obviously has a conflict of interest in raising his own ineffectiveness) and *United States v. Del Munro*, 87 F.3d 1078, 1080 (9th Cir. 1996) (forcing trial counsel to argue his own ineffectiveness at motion for new trial was inherent conflict of interest in violation of the Sixth Amendment).

### 2. The Record Has Not Been Sufficiently Developed to Determine Whether Garey's Performance Goes Beyond Mere Negligence

In *Baldayaque v. United States*, 338 F.3d 145 (2d Cir. 2003), the Second Circuit held that equitable tolling for an untimely § 2255 motion might be available for extraordinary attorney error. Within days after Baldayaque's conviction and sentence were upheld on appeal, he asked his wife to hire an attorney to file a § 2255 motion. Neither Baldayaque nor his wife Christina Rivera spoke English. At their request, Reverend Marquez, a Spanish speaking lawyer associated himself with attorney Burton Weinstein even though Weinstein did not appear to know what a § 2255 motion was. *Id.* at 148.

At an evidentiary hearing, Weinstein denied being asked to file a § 2255 motion but rather a motion for commutation of sentence based on Baldayaque's willingness to be deported. *Ibid.* At one

point Weinstein told Marquez that it was too late to file a § 2255 even though 14 months still remained in which such a motion could be timely filed. Weinstein ultimately filed a motion for modification of the sentence allowing him to be deported but he cited no authority. The motion was denied on the grounds that the court lacked jurisdiction to grant the relief requested. Weinstein's letter to Baldayaque informing him that the motion was denied and that there were no grounds for an appeal was returned to Weinstein as undeliverable. By then the statute of limitations on the § 2255 motion had expired. *Id.* at 149.

The district court dismissed the petition because it believed that Second Circuit precedent – *Smaldone v. Senkowski*, 273 F.3d 133 (2d. Cir. 2001) – precluded a finding of equitable tolling despite the extraordinary actions of the attorney.

In *Smaldone*, the attorney was under the impression that the one-year statute of limitations was reset and the clock began running anew when the state court issued its decision on state collateral relief. 273 F.3d at 138-139. That attorney did what appears to be the same thing that Mr. Garey did, as evidenced by his filing the habeas petition on the very last day and by arguing, as noted above, that the clock should be reset anew. (CR 17 at 4.) The attorney made an

"ordinary" and "simple mistake" in how to calculate the deadline. *Baldayaque*, 338 F.3d at 152.[4]

In distinguishing *Smaldone*, the Second Circuit believed Weinstein's assurances that everything was being done that could be done in combination with other deficiencies at least warranted further factual development on equitable tolling. *Baldayaque*, 338 F.3d at 153.

In Petitioner's case, there has never been any factual development by non-conflicted counsel as to whether Garey merely made a simple and ordinary mistake about how to calculate the deadline[5] or whether his performance was sufficiently egregious to warrant equitable tolling. The district court relied entirely on the facts as presented by Garey, who in no uncertain terms had a conflict of interest. No independent counsel conducted an investigation and/or provided the district court with evidence as to whether Garey may have affirmatively misled Petitioner and/or his family at any time.

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[4] *See also Trapp v. Spencer*, 479 F.3d 53, 59 (1st Cir. 2007) ("Section 2244(d)(2) does not reset the clock on the limitations period . . . but merely stops it temporarily, until the relevant applications for review are ruled upon) and *Dunker v. Bissonnette*, 154 F.Supp.2d 95, 103 (D. Mass. 2001) ("Section 2244(d)(2) only stops, but does not reset, the clock from ticking . . . [and] cannot revive a time period that has already expired.").

[5] Given that the law on how to calculate the deadline has been settled for several years, it is difficult to see how this could be construed as a "simple mistake."

For example, the record does not reveal whether Mr. Garey may have falsely held himself out to Petitioner and his family as an experienced federal habeas practitioner in order to get them to hire him. A cursory review of PACER searches for attorney Michael Garey in the Ninth Circuit[6] and the Central District of California[7] indicate that Mr. Garey had never handled a federal § 2254 habeas petition prior to appellant's case.

The California Supreme Court[8] computer docket search for attorney Michael Garey indicates that he did represent one person in a state habeas petition in 1988, several years before the AEDPA went into effect.

Mr. Garey was, of course, required by state bar ethical rules to act competently or to become competent when taking on a case.[9] It is unknown whether

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[6] The Ninth Circuit search printout was submitted to the Ninth Circuit as Exhibit 9 to the COA request.

[7] The Central District search printout was submitted to the Ninth Circuit as Exhibit 10 to the COA request.

[8] The California Supreme Court search printout was submitted to the Ninth Circuit as Exhibit 11 to the COA request. The state habeas docket number is S005375 (Exhibit 11 at 145-147.) *See* http://appellatecases.courtinfo.ca.gov/.

[9] The California State Bar Rules of Professional Conduct require that attorneys act competently. Rule 3-110 (Failing to Act Competently) Provides: (A) A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence; ¶ (B) For purposes of this rule, "competence" in any legal service shall apply to the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably

(Continued on following page)

Petitioner and/or his family would have hired an attorney who admitted he had never handled an AEDPA § 2254 petition before, particularly when the thrust of Petitioner's claims for relief concerned ineffective assistance of trial counsel.

In this case, Petitioner exercised due diligence when his family sought Mr. Garey's services before the clock on the statute of limitations had even begun to run. Significantly however, Garey did not obtain a declaration from either Petitioner or any of his family members as to: (1) what Garey actually told them about his qualifications to handle a federal habeas petition; (2) what Garey told them about the AEDPA statute of limitations; and (3) whether they would have retained him had they known he had never handled one before. The record does not reveal whether Petitioner would have retained another attorney and/or filed the petition himself had he known that Mr. Garey was unaware of the law on how to correctly calculate the statute of limitations. The record does not reveal what Mr. Garey told Petitioner and/or his family during the course of investigating and preparing the state and federal petitions. Nor does the record reveal what Mr. Garey

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necessary for the performance of such service. ¶ (C) If a member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required.

told Petitioner and/or his family after the first Report was issued recommending the petition be dismissed as time barred. A simple mistake is one thing. Affirmative misrepresentation as to the law and the facts is quite another. *Baldayaque*, 383 F.3d at 153.

This Court should grant certiorari because the issue of whether the district court wrongly prevented Petitioner from retaining new counsel to submit the necessary declarations in support of his claim of equitable tolling is an important one. Certainly reasonable jurists would differ as to the propriety of dismissing the petition without further factual development by non-conflicted counsel.

As revealed by the cases discussed above, the lower courts routinely deal with issues of attorney incompetence vis-a-vis late filing of § 2254 habeas petitions. However, the lower courts are in need of guidance as to what exactly constitutes sufficiently egregious performance by counsel to warrant equitable tolling. There are some circumstances beyond mere negligence that should be evaluated by this Court. There is no dispute that miscalculating the statute of limitations or simply missing the deadline are examples of ordinary attorney negligence. However, it would appear that when an attorney falsely holds him or herself out as an experienced federal habeas practitioner in order to be retained and then fails to timely file the petition, this is sufficiently egregious performance.

Unknowing retention of an incompetent attorney who falsely tells the Petitioner that he has timely filed a petition but does not know the law appears to be an extraordinary circumstance beyond the Petitioner's control. Therefore, reasonable jurists would differ on whether the district court should have permitted further factual development with counsel unburdened by a conflict of interest in order to determine whether equitable tolling was warranted under *Spitsyn v. Moore*, 345 F.3d 796.

The issues of what constitutes sufficiently egregious performance by counsel to warrant equitable tolling and how that determination should be made are squarely presented by this petition. The lower federal courts are in much need of guidance on these recurring issues. Certiorari should be granted.

## CONCLUSION

For the reasons expressed above, Petitioner respectfully requests that a writ of certiorari issue to review the judgment of the Ninth Circuit Court of Appeals.

Date: July 14, 2008

Respectfully submitted,

VERNA WEFALD
*Counsel of Record*

**APPENDIX A**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | |
|---|---|
| AARON PEREZ,<br>Petitioner-Appellant,<br>v.<br>DEPARTMENT OF CORRECTIONS;<br>JAMES E. TILTON;<br>LARRY E. SCRIBNER,<br>Respondents-Appellees. | No. 07-55748<br>D.C. No. CV-06-06743-RGK<br>Central District of California, Los Angeles<br>ORDER<br>(Filed Mar. 31, 2008) |

Before: PREGERSON and THOMAS, Circuit Judges.

The request for a certificate of appealability is denied. *See* 28 U.S.C. § 2253(c)(2). All outstanding motions are denied.

## APPENDIX B

## UNITED STATES DISTRICT COURT

## CENTRAL DISTRICT OF CALIFORNIA

| | |
|---|---|
| **AARON PEREZ,**<br>**Petitioner,**<br>**vs.**<br>**DEPARTMENT OF CORRECTIONS, et al.,**<br>**Respondents.** | **CASE No.**<br>**CV 06-6743 RGK (AJW)**<br>**ORDER RE: CERTIFICATE OF APPEALABILITY**<br>(Filed Jun. 1, 2007) |

On May 30, 2007, petitioner filed a document entitled "Notice of Appeal and Application for Certificate of Appealability," pursuant to 28 U.S.C. § 2253. The Court has reviewed the matter.

**IT IS HEREBY ORDERED:**

☐ The Certificate of Appealability is **GRANTED**. The specific issue(s) satisfy §2253(c)(2) as follows:

_____

_____

_____

☒ The Certificate of Appealability is **DENIED** for the following reason(s):

☒ There has been no substantial showing of the denial of a constitutional right.

☐ The appeal seeks to test the validity of a warrant to remove to another district or place for commitment or trial.

☐ The appeal seeks to test the validity of the detention pending removal proceedings.

DATED: JUN 01 2007

/s/ Gary Klausner
R. Gary Klausner
United States District Judge

## APPENDIX C

## UNITED STATES DISTRICT COURT
## CENTRAL DISTRICT OF CALIFORNIA
## WESTERN DIVISION

| | |
|---|---|
| **AARON PEREZ,** **Petitioner,** **v.** **DEPARTMENT OF CORRECTIONS, et al.,** **Respondents.** | **Case No.** **CV 06-6743 RGK (AJW)** **JUDGMENT** (Filed May 1, 2007) |

**It is hereby adjudged** that the petition for a writ of habeas corpus is dismissed as untimely.

Dated: May 1, 2007

/s/ Gary Klausner
R. Gary Klausner
United States District Judge

## APPENDIX D

## UNITED STATES DISTRICT COURT
## CENTRAL DISTRICT OF CALIFORNIA
## WESTERN DIVISION

| | |
|---|---|
| **AARON PEREZ,** Petitioner, v. **DEPARTMENT OF CORRECTIONS, et al.,** Respondents. | **No. CV 06-6743 RGK (AJW)** **ORDER ADOPTING REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE** (Filed May 1, 2007) |

The Court has reviewed the entire record in this action, the Report and Recommendation of Magistrate Judge ("Report), and petitioner's objections. The Court concurs with and adopts the findings of fact, conclusions of law, and recommendations contained in the Report after having made a *de novo* determination of the portions to which objections were directed.

DATED: MAY 1, 2007

/s/ Gary Klausner
R. Gary Klausner
United States District Judge

## APPENDIX E

## UNITED STATES DISTRICT COURT
## CENTRAL DISTRICT OF CALIFORNIA
## WESTERN DIVISION

| | |
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| **AARON PEREZ,** Petitioner, v. **DEPARTMENT OF CORRECTIONS, et al.,** Respondents. | **Case No. CV 06-6743-RGK (AJW)** **SUPPLEMENTAL REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE** (Filed Apr. 20, 2007) |

On April 6, 2007, a report and recommendation was issued recommending that the petition be dismissed as untimely. Petitioner, who is represented by counsel, filed objections to the report and recommendation on April 16, 2007. Although most of the objections reiterate arguments already discussed and rejected in the original report and recommendation, petitioner's allegation that he is actually innocent warrants brief discussion.

### Discussion

Petitioner contends that his petition should not be dismissed as time barred because he is actually innocent. Petitioner's contention is based upon his allegation that he saw a weapon in the hand of his victim, and therefore he acted in self-defense when he killed the victim. Petitioner's underlying claim is

that his attorney was ineffective for conceding that petitioner's belief that the victim had a weapon was unreasonable. [Objections at 9-12].

The Supreme Court has held that a court may consider an otherwise procedurally defaulted claim for habeas relief if the court's failure to hear the claim will result in a miscarriage of justice, particularly in a case where the petitioner demonstrates "actual innocence." *Schlup v. Delo,* 513 U.S. 298, 324-329 (1995 315-316, 327; *see Majoy v. Roe,* 296 F.3d 770, 775 (9th Cir. 2002) ("Under *Schlup,* a petitioner's otherwise-barred claims [may be] considered on the merits . . . if his claim of actual innocence is sufficient to bring him within the narrow class of cases . . . implicating a fundamental miscarriage of justice.") (quoting *Carriger v. Stewart,* 132 F.3d 463, 477 (9th Cir. 1997) (en banc), *cert. denied,* 523 U.S. 1133 (1998)). However, "[i]n order to pass through *Schlup*'s gateway, and have an otherwise barred constitutional claim heard on the merits, a petitioner must show that, in light of all the evidence, including evidence not introduced at trial, 'it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.'" *Majoy,* 296 F.3d at 776 (explaining that in order to be credible, a claim of actual innocence requires that the petitioner support his allegations of constitutional error with new reliable evidence that was not presented at trial) (quoting *Schlup,* 513 U.S. at 327). This does not mean that a petitioner must show "that he is 'actually innocent' of the crime he was convicted of committing;

instead he must show that 'a court cannot have confidence in the outcome of the trial.'" *Majoy,* 296 F.3d at 776 (quoting *Carriger,* 132 F.3d at 478). Petitioner may, but "need not always affirmatively show physical evidence that he or she did not commit the crime with which he or she is charged . . . [P]etitioner may pass through the *Schlup* gateway by promulgating evidence that significantly undermines or impeaches the credibility of witnesses presented at trial, if all the evidence, including the new evidence, makes it 'more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.'" *Gandarela v. Johnson,* 286 F.3d 1080, 1086 (9th Cir. 2002) (refusing to open the *Schlup* gateway to permit habeas review of procedurally defaulted Confrontation Clause claims because petitioner's showing of actual innocence was inadequate) (quoting *Schlup,* 513 U.S. at 327, 330), *cert. denied,* 537 U.S. 1117 (2003).

As the Ninth Circuit noted in *Majoy,* however, neither it nor the Supreme Court has decided "whether surviving the rigors of [the *Schlup*] gateway has the consequence of overriding AEDPA's one-year statute of limitation. . . ." *Majoy,* 296 F.3d at 776.

In *Majoy,* the petitioner presented evidence that (1) an accomplice who became a cooperating witness, and whose testimony was the foundation for the case against the petitioner, recanted after the petitioner's conviction and said that he had falsely implicated the petitioner; (2) after the petitioner's trial, one of the perpetrators confessed and described the crimes, but

in doing so, never mentioned the petitioner; and (3) a bystander "eyewitness," who at the petitioner's trial had described a hooded person (whom the prosecution argued was the petitioner) leaving the crime scene, testified at a subsequent trial of a co-defendant in a manner arguably excluding the petitioner as being that "hooded" person. *Majoy,* 296 F.3d at 774-775.

After discussing the *Schlup* test, and reviewing these post-trial developments, the court concluded that the petitioner "may be able to muster a plausible factual case meeting the exacting gateway standard established . . . in *Schlup* for overriding a petitioner's clear failure to meet deadlines and requirements for filing a timely petition in federal court." *Majoy,* 296 F.3d at 775. Without deciding the question, the Court remanded to the district court for further findings and a determination whether or not petitioner established a claim of actual innocence under *Schlup,* and if so, "what consequence such a finding has with respect to the AEDPA's one year statute of limitation." *Majoy,* 296 F.3d at 778. Accordingly, pursuant to *Majoy,* this Court need not reach the legal question whether petitioner's claim of actual innocence will excuse his non-compliance with the AEDPA's one year statute of limitation, unless petitioner first meets the prerequisites to the *Schlup* "gateway." *Majoy,* 296 F.3d at 778.

Petitioner's showing of actual innocence is far less than the showing made in *Majoy.* Petitioner's claim rests on his allegation that his testimony that the victim had a gun was true, even though no gun

was found on the victim. Petitioner's allegations are merely reiterations of his underlying claims for relief: namely, that his attorney provided ineffective assistance by undermining petitioner's claim of self-defense. Petitioner does not actually present any *evidence* that he did not commit the charged offense. Petitioner's allegations are insufficient to demonstrate that "all the evidence, including new evidence, makes it 'more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.'" *Gandarela,* 286 F.3d at 1086 (quoting *Schlup,* 513 U.S. at 327).

Unless petitioner shows that his case is one of the few that can meet the exacting test established in *Schlup,* the court need go no further. *Compare Gandarela,* 286 F.3d at 1086-1087 (holding that since the petitioner's showing was inadequate to pass through *Schlup*'s "narrow" gateway, the district court did not abuse its discretion in denying petitioner an evidentiary hearing on his actual innocence claim) *with Majoy,* 296 F.3d at 775 (petitioner's evidence of certain post-trial developments raised the possibility that petitioner may be able to make a factual case meeting the *Schlup* standard, and therefore an evidentiary hearing was warranted). Because petitioner has failed to do so, his claim of actual innocence cannot help him evade the statute of limitation.

In his objections, petitioner also requests an extension of time so that he may retain substitute counsel to argue that his present counsel's conduct entitles him to equitable tolling. The court already

has considered and rejected the contention that petitioner's present counsel's apparent negligence warrants equitable tolling. That determination was based upon a detailed recitation of the facts provided by petitioner's present counsel. Further briefing on the issue is not warranted.

**Conclusion**

For the foregoing reasons, as well as the reasons set forth in the original report and recommendation, the petition should be dismissed as untimely.

Dated: 4.20.2007

/s/ Andrew J. Wistrich
Andrew J. Wistrich
United States Magistrate Judge

# APPENDIX F

## UNITED STATES DISTRICT COURT
## CENTRAL DISTRICT OF CALIFORNIA
## WESTERN DIVISION

| | |
|---|---|
| **AARON PEREZ,** Petitioner, v. **DEPARTMENT OF CORRECTIONS, et al.,** Respondents. | **Case No. CV 06-6743-RGK (AJW)** **REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE** (Filed Apr. 6, 2007) |

Petitioner, who is represented by counsel, filed this petition for a writ of habeas corpus on October 23, 2006.[1] Respondent filed a motion to dismiss the petition, arguing that it is untimely. Petitioner filed an opposition on March 22, 2007.

[1] Because petitioner was represented by counsel when he filed both his federal and state petitions, the "mailbox rule" is inapplicable. *See Houston v. Lack,* 487 U.S. 266, 276 (1988) (holding that a pro se prisoner's pleading is deemed filed at the moment it is delivered to prison authorities for forwarding to the district court); *Stillman v. LaMarque,* 319 F.3d 1199, 1201-1202 (9th Cir. 2003) (holding that a prisoner is not entitled to the benefit of the mailbox rule if he was assisted by a lawyer).

## Discussion

The AEDPA imposes a one-year statute of limitations for the filing of habeas corpus petitions by state prisoners. 28 U.S.C. § 2244(d). Section 2244(d) provides:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
>
> > (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> >
> > (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
> >
> > (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
> >
> > (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d)(1) & (2).

Pursuant to subsection (A), the one-year limitation period in petitioner's case began to run on the date on which the judgment became final. 28 U.S.C. § 2244(d)(1)(A).[2]

Petitioner was convicted of one count of attempted voluntary manslaughter, assault with a firearm, and shooting at an occupied vehicle. He was sentenced to state prison for a term of 25 years to life plus five years. [Lodged Doc. A].

Petitioner appealed to the California Court of Appeal, which affirmed his conviction on February 17, 2004. [Lodged Doc. F]. Petitioner's petition for review was denied by the California Supreme Court on May 12, 2004. [Lodged Doc. H]. Thus, petitioner's conviction became final on August 10, 2004, when the time for filing a petition for a writ of certiorari in the United States Supreme Court expired. *Bowen v. Roe,* 188 F.3d 1157, 1158-1159 (9th Cir. 1999).

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[2] Petitioner argues that he is entitled to application of the delayed triggering date set forth in subsections [sic] (D). That contention is discussed below.

Absent either statutory or equitable tolling, the limitation period expired on [sic] year later, on August 10, 2005. *See Patterson v. Stewart,* 251 F.3d 1243, 1245-1246 (9th Cir. 2001), *cert. denied,* 534 U.S. 978 (2001) *Calderon v. United States District Court (Beeler),* 128 F.3d 1283, 1287 (9th Cir. 1997), *cert. denied,* 522 U.S. 1099 & 523 U.S. 1061 (1998), *overruled on other grounds by Calderon v. United States District Court (Kelly),* 163 F.3d 530 (9th Cir. 1998) (en banc), *cert. denied,* 526 U.S. 1060 (1999).

As noted above, this petition was not filed until October 23, 2006, more than a year after the limitation period expired. Thus, absent grounds for statutory or equitable tolling of the limitation period, the petition is time-barred.

**Statutory tolling**

Petitioner filed his first state habeas petition in the California Court of Appeal on August 10, 2005, the last day of the limitation period. [Lodged Doc. I]. The California Court of Appeal denied the petition on October 12, 2005. [Lodged Doc. J]. Petitioner then filed a habeas petition in the California Supreme Court on October 24, 2005, which was denied on August 30, 2006. [Lodged Docs. K & L].

Based upon these pending petitions, the limitation period was tolled from August 10, 2005 to August 30, 2006. *See Carey v. Saffold,* 536 U.S. 214, 218-219 (2002) (holding that in California, state habeas petitions are "pending" so as to toll the limitation period

during the interval between a lower court's determination of an initial petition and the filing of a subsequent petition in a higher court); *see also Nino v. Galaza,* 183 F.3d 1003, 1006 (9th Cir. 1999), *cert. denied,* 529 U.S. 1104 (2000). It began to run again on August 31, 2006, the day after the California Supreme Court denied petitioner's habeas petition. *See Phelps v. Alameda,* 366 F.3d 722, 724 n.1 (9th Cir. 2004) (noting that under California's amended rules, the California Supreme Court's summary denial of a habeas petition is final upon filing). Because there was only one day of the limitation period remaining, it expired at the end of August 31, 2006. As discussed, petitioner did not file this federal habeas petition until October 23, 2006, more than fifty days after the limitation period had expired.

**Equitable tolling**

The AEDPA's statute of limitation may be equitably tolled upon a showing of "extraordinary circumstances." *Kelly,* 163 F.3d at 541; *Beeler,* 128 F.3d at 1288-1289. As the Supreme Court recently explained, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way. *Pace v. DiGuglielmo,* 544 U.S. 408, 418 & n. 8 (2005);[1] *see*

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[1] The Supreme Court explained that it assumed, without deciding, that equitable tolling is applicable to the AEDPA's statute of limitation. *See Pace,* 544 U.S. at 418 n. 8

*also, Lott v. Mueller,* 304 F.3d 918, 924 (9th Cir. 2002) ("In this circuit, equitable tolling of the filing deadline for a habeas petition is available 'only if extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time.'") (citing *Miles v. Prunty,* 187 F.3d 1104, 1107 (9th Cir. 1999) (quoting *Kelly,* 163 F.3d at 541)). Equitable tolling may be appropriate when "external forces, rather than a petitioner's lack of diligence, account for the failure to file a timely claim." *Lott,* 304 F.3d at 925 (citation omitted).

Petitioner alleges that equitable tolling is warranted because it took him time to retain counsel, and it took retained counsel time to review the record to "discover" the many complex instances of ineffective assistance by his trial and appellate counsel. [Opposition at 4-6]. In support of this argument, petitioner's counsel states that he spent several months in a fruitless effort to find a transcript which would reflect whether petitioner's trial counsel actually sought a continuance (as the attorney stated he did in his declaration). [Opposition at 6-7].

The fact that petitioner's claims are "factually and legally complex" is not an extraordinary circumstance preventing petitioner from filing a timely federal petition. If such were the case, then many petitioners would be entitled to equitable tolling, because much of criminal law, especially in the federal habeas context, could be characterized as "complex," especially if a petitioner is proceeding pro se.

According to the declarations submitted by petitioner, he was able to retain counsel as early as July 7, 2004, before his conviction became final and before the limitation period began to run. Thus, the record does not support the contention that petitioner experienced such difficulty in retaining an attorney that equitable tolling is warranted.

The months that petitioner's counsel spent seeking records to corroborate trial counsel's statement do not warrant equitable tolling. As one of his claims for relief, petitioner alleges that his trial counsel was ineffective because he answered "ready" for trial only eight days after substituting in as counsel and without adequate time to prepare for trial. In his declaration, which was obtained by petitioner's habeas counsel, petitioner's trial counsel stated that he sought a continuance, but it was denied. In an attempt to obtain equitable tolling or delayed accrual of the limitation period, petitioner's habeas counsel says that he spent months searching for a transcript which would confirm that trial counsel made such a motion. But such a record (or the absence of such record) was not necessary for petitioner to state a claim and prepare a petition. To the contrary, so long as it was based upon petitioner's good faith belief in the accuracy of his allegations, petitioner's claim could have been filed in state or federal court without first waiting to determine whether trial counsel's declaration was true.

Finally, petitioner alleges that prison lockdowns should entitle him to equitable tolling. [Opposition at

6]. According to petitioner, there were "frequent" lockdowns from "2004-2006." [Opposition, Ex. C (Declaration of Aaron Perez)]. Even when there was not a lockdown, access to the prison law library was difficult to obtain because petitioner did not have a deadline. [Opposition, Ex. C]. In some circumstances, the denial of access to a law library or legal files may warrant equitable tolling. *See Espinoza-Matthews v. California,* 432 F.3d 1021, 1027-1028 (9th Cir. 2005); *Spitsyn v. Moore,* 345 F.3d 796, 801 (9th Cir. 2003). However, the alleged lack of law library access in this case does not. Petitioner had retained counsel as early as July 7, 2004, when Mr. Garey was hired to investigate and review petitioner's case "for potential issues for habeas corpus relief," or, at the latest as of September 27, 2004, when Mr. Garey was retained to prepare a habeas petition on behalf of petitioner. [Opposition, Ex. A (Declaration of Michael Ian Garey)]. Because he was represented by counsel, petitioner's limited access to the prison law library did not make it impossible for him to file a federal petition on time. His counsel could have performed any legal research that was necessary.

Although petitioner does not say so, the record suggests that petitioner's habeas counsel may have been negligent in failing to file a protective federal petition. Considering the AEDPA's time limit and the possibility that the state petitions might not toll the limitation period, counsel should have filed a federal petition while petitioner's state petition was pending, and then requested a stay in order to complete

exhaustion of petitioner's state remedies. *See Pace*, 544 U.S. at 416 (noting that a prisoner seeking state postconviction relief may file a "'protective' petition in federal court and asking the federal court to stay and abey the federal habeas proceedings until state remedies are exhausted," and noting that a "petitioner's reasonable confusion about whether a state filing would be timely will ordinarily constitute 'good cause' for him to file in federal court."). At a minimum, counsel could have prepared the federal petition while awaiting the California Supreme Court's decision, so that once the state court's decision was filed, he could immediately proceed to federal court.

Mere negligence, malpractice, or ineffective assistance of post-conviction counsel, however, cannot provide the basis for equitable tolling. *See Miranda v. Castro*, 292 F.3d 1063, 1067-1068 (9th Cir.), *cert. denied*, 537 U.S. 1003 (2002); *Frye v. Hickman*, 273 F.3d 1144, 1146 (9th Cir. 2001), *cert. denied*, 535 U.S. 1055 (2002).

In *Frye*, the Ninth Circuit considered a petition which was filed late because the petitioner's attorney miscalculated the statute of limitations deadline. The court held that "the miscalculation of the limitations period by Frye's counsel and his negligence in general do not constitute extraordinary circumstances sufficient to warrant equitable tolling." *Frye*, 273 F.3d at 1146.

The Ninth Circuit reached a similar conclusion in *Miranda*. The petitioner in that case had been given

erroneous information by his appointed counsel on his direct appeal regarding the deadline for filing a habeas petition, and, as a result of the petitioner's reliance on that advice, he subsequently filed his habeas petition after the limitation period had expired. The Ninth Circuit noted that there is no right to effective assistance of counsel during post-conviction proceedings, and reiterated *Frye*'s holding that counsel's miscalculation of the limitation deadline and negligence in general do not constitute "extraordinary circumstances" sufficient to warrant equitable relief. *Miranda,* 292 F.3d at 1068.

In *Spitsyn,* on the other hand, the attorney was hired nearly a full year in advance of the deadline, and completely failed to prepare and file a petition. The petitioner and his mother contacted the attorney "numerous times, by telephone and in writing, seeking action, but these efforts proved fruitless. Furthermore, despite a request that he return [petitioner's] file, [the attorney] retained it for the duration of the limitations period and more than two months beyond. That conduct was so deficient as to distinguish it from the merely negligent performance of counsel in *Frye* and *Miranda*." *Spitsyn,* 345 F.3d at 800. The Ninth Circuit found that these circumstances warranted equitable tolling.

This case involves attorney negligence similar to that present in *Frye* and *Miranda,* rather than the "egregious misconduct" found in *Spitsyn.* Petitioner's counsel did not fail to file a petition that he had promised petitioner he would file. Instead, he negligently

missed the deadline and failed to consider the option of filing a mixed petition in this Court and seeking a stay while he exhausted petitioner's state remedies. Petitioner does not allege, and nothing in the record suggests, that petitioner's counsel affirmatively misled petitioner, failed to respond to petitioner's inquiries, or refused to return petitioner's file, thereby making it impossible for petitioner to prepare and file a timely petition on his own. In sum, this is not the sort of "egregious" and "atypical" attorney misconduct warranting equitable tolling. *See generally Ford v. Hubbard,* 330 F.3d 1086, 1106 (9th Cir. 2003) ("Although routine instances of attorney negligence do not generally constitute "extraordinary circumstances" entitling a habeas petitioner to equitable tolling, . . . there are instances in which an attorney's failure to take necessary steps to protect his client's interests is so egregious and atypical that the court may deem equitable tolling appropriate") (citations omitted), *vacated on other grounds,* 542 U.S. 225 (2004). Accordingly, petitioner is not entitled to equitable tolling.

**Delayed accrual**

Petitioner argues that he is entitled to a delayed accrual date because he

> had no knowledge of the extent of trial counsel's incompetency or of the fact that the counsel who prepared an [sic] argued his new trial motion was incompetent or of the fact that his court appointed appellate counsel

> was incompetent or any of the aforementioned resulting prejudice, until present counsel was fully apprised of the factual predicate of those claims; this was only discovered through the exercise of due diligence by present counsel in reviewing trial court documents, reports, trial transcripts and motions, appellate briefs, speaking with trial counsel, new trial counsel, appellate counsel and the defendant.

[Opposition at 2].

28 U.S.C. § 2244(d)(1)(D) provides that the limitation period begins to run "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." This provision requires that the petitioner act diligently to discover the factual predicate of his claims, and it is the petitioner's burden to show that he did so. *See Hasan v. Galaza,* 254 F.3d 1150, 1154 (9th Cir. 2001); *see also Majoy v. Roe,* 296 F.3d 770, 777 n.3 (9th Cir. 2002). Petitioner has not made such a showing of due diligence. All of the facts on which petitioner's claims are based were developed during the trial, the motion for new trial, or on appeal, so petitioner knew or could have discovered all of the relevant facts before the limitation period even began to run. While petitioner may not have recognized each of the known facts as significant to his claims of ineffective assistance, this does not entitle him to a later starting date. *Hasan,* 254 F.3d at 1154 n. 3 (stating that the statute of limitations begins to run under 28 U.S.C. § 2244(d)(1)(D) when the

prisoner discovers, or through diligence could discover, the important facts, not when the prisoner recognizes their legal significance). Furthermore, even after petitioner "knew" about his claims and presented them to the state courts, he waited fifty-three days after the California Supreme Court denied his petition before filing his petition in this Court. While petitioner's counsel explains that it took him fifty-three days to "rework the state court petitions into a properly supported federal petition," and that he was busy with a medical fraud case, that explanation does not serve as a basis for applying equitable tolling nor does it fit within the statutory requirements of delayed accrual under section 2244(d)(1)(D).

**Conclusion**

For the foregoing reasons, it is recommended the petition be dismissed as untimely.

Dated: 4.5.2007

/s/ Andrew J. Wistrich
Andrew J. Wistrich
United States Magistrate Judge

## APPENDIX G

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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|---|---|
| AARON PEREZ,<br>Petitioner-Appellant,<br>v.<br>DEPARTMENT OF CORRECTIONS; JAMES E. TILTON, Secretary; LARRY SCRIBNER,<br>Respondents-Appellees. | No. 07-55748<br>D.C. No. CV-06-06743-RGK Central District of California, Los Angeles<br>ORDER<br>(Filed Apr. 23, 2008) |

Before: B. FLETCHER and GOULD, Circuit Judges.

Perez's motion for reconsideration en banc is construed as a motion for reconsideration with suggestion for rehearing en banc. So construed, the motion is denied. *See* 9th Cir. R. 27-10; Gen. Ord. § 6.11 (panel may reject request for en banc hearing on behalf of court).

No further filings shall be accepted in this closed docket.